UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of SHAW'S SUPERMARKETS Employer-Petitioner and LOCAL 791, UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO Union	Case 1-RM-1267

DECISION AND ORDER

This case primarily involves the issue of whether an "after-acquired" stores clause contained in the collective-bargaining agreement in effect between the Employer-Petitioner, Shaw's Supermarkets (Shaw's or Employer), and Local 791, United Food and Commercial Workers Union, AFL-CIO (Union) requires dismissal of the petition because it constitutes a clear and unmistakable waiver of the Employer's right to a Board election; and, if so, whether public policy reasons outweigh the Employer's private agreement not to have a Board conducted election. Also under consideration are other grounds for dismissal of the petition.

Procedural History

By letter dated May 14, 2004, the Acting Regional Director for Region One, relying upon *Central Parking System, Inc.*, 335 NLRB 390 (2001), administratively dismissed the Employer's petition on the ground that the Union's demand for recognition based on a contractual "after-acquired" clause and the proffer of cards from an alleged majority of unit employees did not entitle the Employer to demand an election under Section 9(c)(1)(B).

On December 8, 2004, the Board issued a Decision on Review and Order Remanding,[1] in which it ordered that a hearing be held and stated that the issues in this case include:

[1] 343 NLRB No. 105 (2004).

> (1) Whether the Employer clearly and unmistakably waived the right to a Board election; (2) if so, whether public policy reasons outweigh the Employer's private agreement not to have an election.

The Board also indicated that it did not mean to foreclose other issues from being raised at the hearing, and indicated that other issues for hearing could include the nature of the appropriate unit and eligibility questions.

I. Scope of the Hearing[2]

In its Decision, the Board stated that "[b]y granting review and a hearing, we simply wish to take evidence concerning the meaning of the instant [after-acquired] stores clause." 343 NLRB No. 105 (slip op. at 1). Therefore, at the hearing the parties were given an opportunity to make a full record with respect to the waiver issue,[3] including the related matter of what consideration, if any, may have been given in exchange for the after-acquired clause.

In this Decision, I am not being asked to decide whether any changes should be made in current law, but only to apply the current law to the facts of the case.[4] Further, I do not consider the issue of public policy to be one which was remanded for my decision.

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[2] The hearing was held before a hearing officer of the National Labor Relations Board. Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing, except as discussed in Section III, infra, are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Both parties filed post-hearing briefs. Thereafter, the Employer filed a Reply Brief. Reply briefs may only be filed upon special leave by the Regional Director under Section 102.67(a) of the Board's Rules. Although normally I would reject this reply brief as no compelling need for such was established by the Employer in advance of submitting its reply, because of the unusual nature of this proceeding I will accept it.

[3] At the hearing, the Employer was allowed some latitude to place on the record a description of certain conduct and practices of the parties (not all of which are admitted by the Union) that, in its view, provide reasons for concluding that the right to a Board election may not be waived.

[4] I do not consider *Central Parking* to have been overruled by the Board's remand. Indeed, the Board states in its remand that "[I]n our view, there is at least a reasonable argument that the Board should not defer (issues about coercion in the solicitation of authorization cards) to the grievance arbitration process. … By granting review here, we keep open the possibility that the Board will abide by the general rule rather than *Central Parking*." 343 NLRB No. 105 (slip op. at 2).

With its post-hearing brief, the Employer submitted a motion requesting that I exercise my discretion pursuant to Sec. 102.67(h) of the Board's Rules and Regulations, Series 8, as amended, to transfer this case directly to the Board for decision. That motion is denied. In all the circumstances, including the considerable length of the record and the fact that I am only called upon to apply current Board law to issues that are not novel, I do not deem it appropriate to transfer the case to the Board for decision.

II. The Contract Waiver Issue:

A. Introduction

The Employer operates a chain of 210 supermarkets located throughout the six New England states. It seeks a Board election among the employees at its store located in Mansfield, Massachusetts. The Union contends that the Employer has waived its right to an election and that, therefore, the petition must be dismissed, while the Employer contends that there has been no such waiver. I conclude that, under current Board law, the Employer has waived its right to a Board election and that the petition must be dismissed.

B. The Collective-Bargaining Relationship between the Parties

The Employer and the Union are party to a collective-bargaining agreement (known as the Southern Region contract), which currently is being applied by the Employer to 39 supermarkets in Rhode Island and southern Massachusetts.[5]

1. Article 1 of the Contract and the "New Stores" Clause

The Southern Region contract in effect at the time of the Union's proffered demonstration of majority status among the employees of the Mansfield store had a term that ran from July 28, 2001 through July 31, 2004. "ARTICLE 1/RECOGNITION," (hereafter Article 1) of this contract provides, in pertinent part:[6]

> Subject to any applicable provisions of State or Federal law or regulation now or hereafter in effect, the Employer recognizes the Union as the exclusive bargaining agent with respect to wages, hours, and other conditions of employment of all Employees at the Employer's stores and warehouses presently, or hereafter, located in the following counties within the Commonwealth of Massachusetts: Norfolk, Plymouth, Bristol and Barnstable and the State of Rhode Island, including part-time Employees, but excluding executives, buyers, store managers, one perishable manager and one non-perishable manager per store, pharmacists and one personnel coordinator per store, office clerical Employees, guards, professional Employees and supervisors as defined by the National Labor Relations Act, and as hereinafter used in this Agreement the words "Employee" and "Employees" will be deemed to refer to and only to an Employee or Employees, respectively, of the Employer in the bargaining unit described above.

[5] As will appear, the Union contends, and the Employer denies, that the Mansfield store has been part of this bargaining unit since the latter part of August 2003.

[6] The instant RM petition was filed during the term of the current Southern Region contract, which runs from August 1, 2004 through August 2, 2008. Article 1 in the 2004-2008 contract is identical to that in the 2001-2004 agreement.

ADDENDUM ONE of the 2001-2004 Southern Region contract contains the following provision (hereafter referred to as the "new stores" clause):

> 8. New Stores
>
> When the Employer opens new stores within the geographic area described in Article 1, the Employer will allow access within the store prior to opening during the hiring process, will remain neutral, and will recognize the Union and apply the contract when a majority of Employees have authorized the Union to represent them.[7]

Language substantially identical to the above-quoted portion of Article 1 (except as to the applicable geographical area and the enumeration of excluded job classifications) has existed in the predecessor contracts since at least the contract that went into effect on November 1, 1967.[8]

No parol or other extrinsic evidence as to the meaning of Article 1 or its counterpart in the predecessor contracts was introduced by either party at the hearing.

The new stores clause in the 2001-2004 contract first appeared, in identical language,[9] in an agreement between the Employer and the Independent Foodhandlers and Warehouse Employees Union which was reached on July 25, 1989.[10] This agreement

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[7] The new stores clause in the 2001-2004 agreement has been carried forward into the 2004-2008 contract without change, except for the addition of the following language: "Neutrality shall not be construed to prohibit truthful statements by the Company, provided that the Employer will not advocate against union representation."

[8] This November 1, 1967 contract was between the Employer's predecessor, Brockton Public Markets, and a predecessor of the Union, Brockton Retail Clerks Union. "ARTICLE I/RECOGNITION" in that contract reads:

> Subject to any applicable provisions of State or Federal Law or regulation now or hereafter in effect, the Employer recognizes the Union as the exclusive bargaining agent with respect to wages, hours and other conditions of employment of all Employees at the Employer's stores and warehouses presently or hereafter located in the following counties within the Commonwealth of Massachusetts: Norfolk, Plymouth, Bristol and Barnstable (provided, however, that this contract, including Article 1 thereof, shall not be applicable to either of the Employer's stores presently located in New Bedford and Dartmouth, Massachusetts), including part-time employees, but excluding executives, buyers, store managers, assistant store managers, office clerical employees, guards, professional employees and supervisors as defined by the National Labor Relations Act; and as hereinafter used in this Agreement the words "Employee" and "Employees" will be deemed to refer to and only to an employee or employees, respectively, of the Company in the bargaining unit described above.

[9] While there are several minor differences in capitalization, underlining, and the like, between the two clauses, they do not affect their meaning.

[10] According to a May 3, 2003 award by arbitrator Mark L. Irvings in an arbitration between the parties, AAA Case No. 11 300 02796 01, Brockton Public Markets merged in 1979 with George C. Shaw Co., forming the Employer. Whether the Independent Foodhandlers Warehouse Employees Union was a

provided that its provisions were "part of the 1988-1991 agreement as if incorporated therein but will not be printed in the contract booklet."[11]

David Watson, one of the Employer's attorneys, and Mary McClay, the Union's Director of Grievance and Arbitration, both testified that in the negotiations that led up to the original new stores clause in 1989, in which they had both participated, there had been no discussions that touched on the subject of the Employer's either waiving or not waiving its right to a Board election. Eric Nadworny, the Employer's Vice President, Associate & Labor Relations, testified without challenge from the Union that there had also been no such discussions during the bargaining for the 2004-2008 contract.[12] In all other respects as well, the record is devoid of any parol or other extrinsic evidence going to the meaning of the new stores clause.

Because a valid contract is by definition one that is supported by adequate consideration, there would appear to be no dispute as to the adequacy of the consideration received for the after-acquired stores language in the Southern Region contracts, inasmuch as neither party challenges the validity of these contracts. It may be further noted that no evidence was introduced as to what consideration may have been specifically exchanged for Article 1 or the new stores clause when they were originally agreed to. In both the negotiations for the 2001-2004 and the 2004-2008 contracts, the Employer proposed eliminating the new stores clause and revising Article1 to define the unit as consisting of only the employees employed in the stores currently included in the unit. In both negotiations, the Employer ultimately withdrew these proposals in the concessionary bargaining that led to contract formation.

The record does not disclose exactly how many of the 39 stores to which the Southern Region contract is currently being applied came to be included within that unit as a result of voluntary recognition granted by the Employer. Watson thought that about 10 to 12 stores had been so included since 1988, while McClay estimated that about 14 stores had been so included since 1992. It is undisputed that the instant petition is the first to have been filed by either party involving the Southern Region contract.

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successor to the Brockton Retail Clerks Union or was in fact the same union under a new name to reflect the changed circumstances brought about by the merger does not appear in the record.

[11] The Independent Foodhandlers and Warehouse Employees Union affiliated with the United Food and Commercial Workers Union, AFL-CIO, CLC in 1991. The term of the first collective-bargaining agreement between UFCW Local 791 and the Employer ran from July 27, 1991 through July 30, 1994.

[12] In the bargaining for the 2004-2008 contract, the Employer had originally proposed the elimination of the new stores clause, but ultimately withdrew this proposal. As noted herein ultimately the 2004-2008 contract carried forward the old new stores language to which additional language on Employer neutrality was added.

2. The Grievance Arbitration Clause

ARTICLE 13/GRIEVANCE AND ARBITRATION PROCEDURE" of the 2001-2004 contract provides, in pertinent part, that:

> The following procedures are intended to be the sole means for the resolution of grievances, which for the purposes of this Agreement are defined as disputes between the Management and the Union or covered Employee(s) concerning the meaning or application of this Agreement…

C. The Mansfield Store Dispute

The Employer's Mansfield, Massachusetts supermarket first opened for business on August 22, 2003.[13] The Employer began the hiring process for the Mansfield store on July 27 or 28 and completed it on September 12. On August 13, the Union wrote to the Employer claiming that it represented a majority of the Mansfield employees and demanding that they be placed under the Southern Region contract. By letter dated August 14, Nadworny replied, in pertinent part:

> I am in receipt of your letter of August 13, demanding recognition of Local 791 at the Mansfield store. As per our existing practice, please submit proof of your assertion that the Union has majority status as of this date. As we have done in the past, upon review and verification of proof of majority status, Shaw's will recognize Local 791 and apply the collective bargaining agreement to the Mansfield store.

On August 19, the Union delivered to the Employer a total of 85 membership and authorization cards that the Union claims are valid cards executed by Mansfield employees. On or about August 22, the Union supplied the Employer with an additional 11 such cards. The parties agree that if these 96 cards are valid, the Union achieved majority status, regardless of the outcome of the single disagreement of the parties as to the definition of the appropriate unit.[14] However, the Employer contends that enough of these cards must be disqualified for various reasons that in fact no demonstration of majority has been made.[15]

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[13] Hereafter, all dates are in 2003, unless otherwise noted.

[14] There appears to be about 175 employees at Mansfield. As will be discussed more fully, infra, the only dispute between the parties as to what job classifications should be included in the unit concerns the seven Mansfield department managers, who the Employer claims should be excluded from the unit because they are supervisors.

[15] In addition to claims of Union coercion in the obtaining of some of the cards, the Employer alleges at least 10 other reasons, including such claims as that there are cards lacking signatures, cards signed by individuals prior to their having been hired, and cards signed by individuals who subsequently requested them back. It appears that the number of allegedly unsigned cards does not constitute a significant percentage of the total number of cards submitted to the Employer. I base this conclusion on the fact that Employer documents in the record and the testimony of its witness on the subject of the cards, Nadworny, place central emphasis on claims of Union misrepresentation and coercion and that the May 11, 2004 letter

At all times since August 13, the Employer has refused to recognize the Union as the representative of the Mansfield employees.

On August 22, the Union filed a grievance claiming that the Employer had violated the 2001-2004 contract by: 1) failing to recognize the Union as the bargaining representative of the Mansfield employees and apply the Southern Region contract to them after the Union had demonstrated majority support; 2) having denied the Union access to the Mansfield store during its campaign to organize the store; and 3) having failed to remain neutral during that campaign. On October 23, the Union filed for the arbitration of this grievance, which had been denied in its entirety by the Employer.

The instant petition was filed on April 21, 2004. As the Employer contends that the Union never achieved majority support among the Mansfield employees, the Employer submitted no showing of interest concerning loss of majority status with the petition. Rather, the Employer contended that the Union's demand for recognition entitles it to petition for an election under Section 9(c) (1) (B) of the Act.

An arbitration hearing apparently opened on the grievance on June 2, 2004, but was suspended after the remand on this petition issued.[16]

During the Union's organizing campaign at Mansfield, the Employer distributed certain communications to employees concerning the Union. Thus, during that organizing campaign, the Employer distributed to the new hires a leaflet captioned "Information about Union Membership/The Choice Is Yours," which informed them, *inter alia*, that:

> If you decide to join the union, and the union obtains majority status at the store where you work, you will be required to pay an initiation fee, which is currently $100 for part-time associates and $200 for full-time associates. If you choose not to join the union, you will not have to pay this initiation fee. You will also be required to pay union dues, which are currently $6.75 a week for part-time associates and $8.75 per week for full-time associates.
>
> If you exercise your choice not to join a union, you will not have to pay full union dues or fees. In that case, if the Union obtains majority status, you will have to pay an amount to the union that will be less than the full amount of union dues and fees. You will not have to pay an initiation fee.

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of Employer attorney Richard Moon to the arbitrator in the arbitration, referred to below, indicates that litigating the validity of the cards submitted by the Union would be very time-consuming.

[16] It is the position of the Employer before the arbitrator that the issue of whether the Union should be accorded recognition is not properly before him.

> If the Union does not obtain majority status, you will not be required to pay any Union dues or initiation fees.

The Employer also distributed a leaflet captioned "WAGE AND BENEFIT COMPARISON-UNION (LOCAL 791) AND NON-UNION" that compares various wages and benefits as between its Local 791 stores and its non-union stores. As to sick leave, for example, this leaflet states that the Union contract provides "no sick leave until 2nd anniversary of employment," while with respect to its unrepresented stores it says:

> Based on hours worked; work more, earn more
> Earn time every week
> Earn block credit every January
> Flexible to use[.]

On September 17, the Employer distributed a letter to the Mansfield employees, stating, *inter alia*:

> Local 791's recent letter to you regarding the Mansfield store is unfortunate. The Union has misstated the facts and mischaracterized Shaw's position…
>
> Local 791 presented cards from fewer than half of the associates who work at Mansfield…
>
> Unfortunately, there have been complaints of harassment and misrepresentations by Union organizers. The actions of the Union representatives were bad enough that we have had to file an unfair labor practice charge with the National Labor Relations Board in the hopes of preventing further misconduct…[17]

D. Analysis of the Waiver Issue

The Employer's argument in its post-hearing brief as to whether it has waived its right to a Board election may be simply stated. The presumption that parties in their collective-bargaining agreements have not waived the rights guaranteed them by the Act, in this case, an employer's right to a Board election under Section 9(c)(1)(B), can only be rebutted by clear and unmistakable evidence.[18] Neither Article 1 nor the new stores clause expressly precludes either party from resolving the question of majority status by

[17] This Section 8(b)(1)(A) and (2) charge, Case 1-CB-10169, was administratively dismissed by the General Counsel on January 22, 2004.

[18] For a concise explanation of the Board's clear and unmistakable waiver of statutory rights standard, see *A-1 Fire Protection, Inc.*, 250 NLRB 217, 219 (1980).

resorting to a Board election. Therefore, there has been no clear and unmistakable waiver of the Employer's right to a Board election.[19]

The Union's position is that at least 25 years of Board law supports the proposition that the Employer waived its right to a Board election by agreeing to the terms of the contract in this case. The Union asserts that the clauses in question in this case were negotiated in light of the parties' understanding of the legal precedent concerning after-acquired clauses. In addition, the Union argues, the give and take of negotiations over the years discloses that the Employer received many benefits from the Union in exchange for this waiver. Then, the Union continues, the terms of the contract require the Employer to resolve all disputes concerning the application of the agreement through the contractual grievance-arbitration procedure.

On the facts of this case and under current law, I find the Employer's argument unpersuasive.

The meaning of Article 1 is clear. This language plainly says that new stores will be placed within the Union's existing bargaining unit as an accretion to the extent permitted by law. For the last 30 years, the Board has found that an employer waives its right to a Board election by agreeing to such an additional stores clause. *Kroger Co.*, 219 NLRB 388 (1975).[20]

There is no additional or extrinsic evidence in this case that dilutes this plain meaning of Article 1. Furthermore, there is nothing in the subsequently negotiated "new stores" clause that *restores* to the Employer the right to a Board election that Article I had originally taken away. Rather, the most that can be said about the "new stores" clause in support of the Employer's view is that, standing alone, it is at best unclear whether the language in the new stores clause ("when a majority of Employees have authorized the Union to represent them") includes an Employer option to seek a Board election. The canons of construction require that the provisions of a contract be construed in such a

[19] This argument acknowledges that Article 1 and the new stores clause together constitute the after-acquired stores language of the contract. However, in its request for review of the administrative dismissal of this petition, the Employer only identified the new stores clause as the after-acquired stores language of the contract, and the Union's brief in opposition did not challenge this premise. Consequently, Article 1 was not brought to the Board's attention. It seems apparent that the Board assumed that the new stores clause constitutes the entire after-acquired stores language in the contract. Thus, the Board was looking solely to the new stores clause when it expressed its concern that the after-acquired stores clause might fail for indefiniteness in that it does not describe the appropriate unit or the eligible employees. But it is in the Article 1 portion of the after-acquired stores agreement that the unit is clearly defined as all store employees except those specifically excluded in that article. Moreover, the new stores clause itself, in providing that the attainment of majority support will result in the application of the Southern Region contract, implicitly incorporates not only the unit definition set forth in Article 1, but also the more detailed definition of the unit that is provided by the contractual wage provisions, which are set forth in Appendix A of the contract.

[20] Hereafter, this case will be referred to as *Kroger II*, to distinguish it from the Board's original decision in that case, *Kroger Co.*, 208 NLRB 928 (1974), *revd. and remanded sub nom. Retail Clerks, Local 455 v. NLRB*, 510 F. 2d 802 (D.C. Cir. 1975).

way as to be consistent with each other to the extent possible, however. Restatement of the Law, Second, Contracts 2d §202(5)(1981).[21] Therefore, as the "new stores clause" does not plainly restore the right to a Board election, any ambiguity of the quoted language must be resolved in favor of finding that the new stores clause was not intended to nullify the waiver of the Employer's right to a Board election contained in Article 1. This conclusion is underscored by the fact that the parties in practice have applied the contract to accrete new stores on at least ten occasions, and neither party has filed a petition on the Southern Region contract until the Employer filed this RM petition.

Accordingly, it must be concluded that the Employer did in fact contractually waive its right to a Board election. *Kroger II*, supra. This is so regardless of whether the union here has yet to achieve representative status. Having waived its right to a Board election prior to the Union becoming the exclusive bargaining representative of the Mansfield employees, there is no basis to process the instant petition and the petition must be dismissed. *Central Parking System*, 335 NLRB 390 (2001) (RM petition filed in response to a union's invocation of an after-acquired clause does not raise a question concerning representation that entitles an employer to demand an election under Section 9(c)(1)(B)). Additionally, as there is no right to a Board election in the case of an incumbent union through the filing of an RM petition unsupported by objective considerations that demonstrate that the Union has lost its representative status, the petition must be dismissed on that ground as well. *U.S Gypsum*, 157 NLRB 652 (1966) (once a union has obtained exclusive representative status, that status may not be tested by an employer petition that is unsupported by objective considerations that it has some reasonable grounds for believing that a union has lost majority status).

Under current law, an issue of contract interpretation arising from the assertion of an after-acquired clause is a matter that is properly resolvable through the grievance-arbitration procedure. *Central Parking*, supra at 391 fn.3. In the context of an after-acquired clause, where both the unit is set forth and the contract is deemed to apply to the newly included employees, an arbitrator is appropriately able to determine if an employer has breached its agreement by refusing to apply the clauses in question, including the issue of the validity of the cards. Cases cited by the Employer for contrary propositions do not involve after-acquired store situations.

E. The Employer Agreed to Grant Recognition to the Union Based upon a Card Check

Even if the Employer were correct in its contention that it did not contractually waive its right to a Board election in this case, the facts disclose that it otherwise voluntarily agreed to recognize the Union on the basis of a card check, and the petition must also be dismissed for that reason.

[21] And see, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995), where the Supreme Court found that "respondents' reading of these two clauses violates another cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other."

By letter dated August 14, the Employer offered to recognize the Union at the Mansfield store upon demonstration of majority status. Within the next few days, the Union delivered to the Employer a sufficient number of cards to demonstrate that a majority of the employees in the Mansfield store had selected the Union. The Employer still refused to recognize the Union.

For many years, the courts and the Board have held that the right of an employer to insist upon a Board-directed election is not absolute. *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 fn. 8 (1956); *United Butchers Abattoir*, 123 NLRB 946, 957 (1959); *Snow & Sons*, 134 NLRB 709, 710 (1961). Further, it is well established that when an employer agrees to recognize a union on proof of its majority status through a card check, it is bound by the card check results and violates the Act if it thereafter refuses to recognize the union or withdraws recognition. *Green Briar Nursing Home*, 201 NLRB 503 (1973); see also *Research Management Corp.*, 302 NLRB 627, 643 (1991).

Here, the Employer made an express statement of willingness to recognize the Union after a card check, and the check was performed. In this circumstance, the Board will find that an employer has voluntarily recognized a union as there has been a clear and unequivocal agreement by the employer to recognize the union on proof of majority status, and the union's majority status has been demonstrated. *Terracon, Inc.*, 339 NLRB No. 35 (2003) (slip op. at 3); *Nantucket Fish Co.*, 309 NLRB 794, 795 (1992). Accordingly, based on the express promise of August 14 alone, the Employer here agreed to recognize the Union. For the reasons set forth above, issues concerning the validity of the cards could be addressed by the grievance-arbitration proceeding.[22]

F. The Employer is Estopped from Filing an RM petition

On August 14, the Employer agreed to grant recognition to the Union based on a card check. In reliance on that pledge, the Union submitted 96 union membership and authorization cards to the Employer. Based upon the Employer's view of the import of the neutrality provision of the new stores clause, it waged what appears to have been a substantial campaign against unionization, even if it refrained from saying in so many words that it did not want the employees to select the Union. The knowledge that the Employer gained from the cards submitted as to which Mansfield employees were pro-union permitted a more efficient use of its resources in opposing unionization than would have otherwise been the case. The Employer's promise thus induced the Union to act to its detriment.

The Board has recognized an estoppel doctrine in a similar circumstance. In *Verizon Information Systems*, 335 NLRB 558 (2001), the petitioner was a union that had filed an election petition after having obtained useful information from the employer pursuant to a voluntary recognition agreement about certain of the employer's employees whom it was attempting to organize. The Board found that had the union not invoked

[22] As the "new stores" clause sweeps accreted employees into the contract as well as into the unit, if recognition has been extended, the petition must also be dismissed as untimely on contract bar grounds.

the procedures of the voluntary recognition agreement, including obtaining the advantageous information from the employer, but filed an election petition instead, it would not have found that the voluntary recognition agreement barred the petition. That is, the Board found that the union had not waived its right to seek a Board election. Nevertheless, it held that once the union had elected to invoke the procedures of the voluntary recognition agreement and obtained a benefit at the employer's expense in so doing, it was estopped from attempting to obtain exclusive representative status through an election petition. Thus, it is clear under *Verizon* that even if the Employer did not waive its right to a Board election in the after-acquired stores provisions of the contract, it is estopped from filing an RM petition until it has fully complied with the requirements of the voluntary recognition option of the contract, including the pending arbitration concerning the Mansfield employees. That arbitration will provide an opportunity for the Employer to get a determination on its allegations of a lack of a valid majority.

III. The Department Manager Stipulation

At the hearing, the hearing officer accepted a stipulation of the parties (Board Exhibit 3) that was intended to become effective in the event that the Board determined that an RM election should be held. The stipulation provides for a self-determination election in which the Mansfield employees will be given the single choice of being included in the Union's Southern Region unit. The stipulation's Mansfield unit description appears to be substantially identical to what that description would be under the terms of Article 1

The stipulation also provides that, prior to an election, if one is ordered, the record in this case will be reopened to take evidence to determine whether the seven Mansfield department managers are statutory supervisors.[23]

The department managers in the 39 stores where the Employer currently recognizes the Union have always been included in the unit. The department managers are even listed as a separate classification in the contract's wage provisions, Appendix A. Moreover, under Article 12 D Section 2 of the contract, when a full-time job covered by the contract becomes available, it must be filled by the promotion or transfer of a unit employee. Under Article 12 B, the department manager positions may be bumped into by employees in a higher-rated classification in the case of a layoff. Under Article 12 A, recall is by seniority within job classification. As the Employer's department managers in the 39 stores where the Employer recognizes the Union are among the highest paid positions under the contract, the placement of the department manager position in the unit has serious implications for employees under the contract.

In this case, the Employer's representation is that, while the department managers in the 39 unionized stores are statutory employees, the department managers in its non-union stores, including Mansfield, are given additional job duties that make them

[23] The departments in question are the bakery, seafood, meat, deli, customer service, grocery, and produce departments.

statutory supervisors. The Union's position is that the Mansfield department managers are indistinguishable from their counterparts in the other 39 stores and that they are all statutory employees.

I have determined to reject the stipulation. The delay in holding the election that would be caused by a further pre-election hearing is not warranted. There are only seven Mansfield department managers in a voting unit of approximately 175 employees. The issue of whether they are statutory supervisors may be appropriately resolved in the challenge procedure, if necessary.

ORDER

IT IS HEREBY ORDERED that the petition is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by April 5, 2005

/s/ Rosemary Pye

Rosemary Pye Regional Director
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First Region
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Boston, Massachusetts 02222-1072

Dated at Boston, Massachusetts
this 22nd day of March, 2005

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